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No. 85-321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HOWARD B. PETERSON, III,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; WILLIAM R. KOONTZ; WILLIAM G. MATHIS; DAVID B. COUCH; AND ARTHUR R. MAGILL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 22.5 of the Rules of this Court, the petitioner files this short Reply Brief in support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

In their effort to persuade this Court to deny the petition, the respondents (1) downplay the importance of the conflict between the decisions of the federal courts of appeals and the state court of California regarding the availability of punitive damages in duty of fair representation cases; (2) incorrectly assert that the preemption issue is not properly before the Court; and (3) downplay the importance of the case by mischaracterizing and misstating the facts. This short reply brief will address these points.

There Is A Clear Conflict Between The Federal Courts Of Appeals And The California State Courts.

In drawing the Court's attention to the conflict between the federal courts of appeals and the holding of California's First District Court of Appeal, the petitioner pointed out that the California Supreme Court, in denying hearing, directed the California Reporter of Decisions not to publish the lower court's decision in *Seritis v. Hotel and Restaurant Employees' Union, Local 28*, 167 Cal. App. 3d. 78 (1st Dist. 1985). In their opposition to the petition, the respondents downplay the importance of this decision because it is stripped of any precedential value. Cal. R. of Ct. 976(b). The respondents go on to *speculate* regarding the reasons why the California Supreme Court may have upheld the punitive damage award while ordering that the decision not be published.

Conjecture over why the California Supreme Court directed non-publication does not change the fact that the victims of the union's egregious actions in the *Seritis* case were able to recover punitive damages on their duty of fair representation claims. Although the *Seritis* decision may not serve as precedent in other California proceedings, it clearly conflicts with the holdings of the federal courts of appeals which interpreted *Foust v. Electrical Workers*, 442 U.S. 42 (1979), as establishing a *per se* rule against punitive damage awards in duty of fair representation cases and demonstrates the problems faced by the lower courts in applying *Foust*.

It is respectfully submitted that the lower federal courts have misconstrued this Court's decision in *Foust* and have taken it to be a grant of complete immunity from punitive damage awards no matter how egregious

the union's breach of its duty of fair representation. Petitioner urges the Court to clarify its holding in *Foust* and adopt the position recommended by Justice Blackmun, *i.e.*, "the solution . . . is not to ban punitive damages across the board, but to restrict them to their proper sphere, namely, to those rare cases where the union's conduct can truly be described as outrageous." *Id.* at 60.

The Preemption Issue Is Properly Before The Court.

In their brief in opposition, the respondents urge the Court to disregard petitioner's preemption argument because the pendent state law claims were not reasserted in his final Amended Complaint. A detailed review of the district court's orders and the various amended complaints refutes the respondents' arguments.

On July 7, 1980 the petitioner filed his original Complaint alleging, *inter alia*, four causes of action against the union: one federal cause of action for breach of the duty of fair representation and three pendent state tort claims alleging blacklisting, interference with contractual relations, and civil conspiracy. These three pendent state tort claims also named the four individual pilot respondents and some two hundred unnamed pilots as defendant tortfeasors. Complaint [Docket No. 1]. Following a year and a half of extensive discovery, the petitioner moved to file an amended complaint incorporating additional facts uncovered during discovery and identifying some of the two hundred previously unnamed pilot defendants. Motion to Amend [Docket No. 105]. The district court denied the motion to file a First Amended Complaint. April 26, 1982 Order [Docket No. 110].

In January of 1983 the district court issued an order which, *inter alia*, dismissed the punitive damage claim against the union (*Foust*), granted summary judgment to the respondents on the pendent state tort claims (pre-emption), and granted petitioner leave to file an amended complaint alleging that Piedmont had aided and abetted the union in its breach of the duty of fair representation. January 27, 1983 Order [Docket No. 132]; Petition for Certiorari, Appendix 24a-33a. The district court refused to reconsider its decision and denied a request to certify the issues for interlocutory appeal. March 25, 1983 Order [Docket No. 146].

In his Second Amended Complaint, the petitioner added the aiding and abetting claim against Piedmont and also reasserted all of his pendent state tort claims against the respondents. Second Amended Complaint [Docket No. 170]. In reasserting these claims, the petitioner noted that he was:

> expressly reserv[ing] and incorporat[ing] by reference all claims against all parties heretofore stated in this action and denied by said Orders. Although this Court's Order, dated January 27, 1983, dismissed certain claims and defendants, said Order was not a final judgment within the meaning of Rule 54(b), Fed.R.Civ.P.; therefore, plaintiff reiterates said claims against said defendants in this pleading in order to preserve them.

Second Amended Complaint, n.1. The district court subsequently granted the respondents' motion to strike the Second Amended Complaint and gave the petitioner ten days in which to file a Third Amended Complaint.

The pendent state tort claims were *not* reasserted in that complaint. Third Amended Complaint [Docket No. 161]. A year later the court held that petitioner's remaining claims were time-barred, relying on this Court's decision in *DelCostello v Teamsters*, 462 U.S. 151 (1983). Opinion [Docket No. 178]. Petitioner specifically appealed the dismissal of his pendent state tort claims in his Notice of Appeal to the Fourth Circuit [Docket No. 180] and presented the preemption issue to that Court of Appeals.

Respondents are incorrect in asserting that the preemption issue is not before this Court. Petitioner has done everything necessary to preserve this issue and respectfully moves the Court to address this important question regarding the preemptive effect of the Railway Labor Act.

Respondents' Mischaracterization of the Facts.

This case has *not* been to trial and the facts are heavily in dispute. The present petition challenges the district court's summary judgment order dismissing petitioner's claim for punitive damages and holding that his pendent state tort claims were preempted by the Railway Labor Act. There has been no ruling on the merits of petitioner's claim that the pilots' union breached its duty of fair representation by blacklisting him and then enforcing the blacklist through a pilot slowdown of Piedmont's flight operations designed to coerce his discharge. Thus, for purposes of this petition, the facts as alleged in the complaint must be construed in favor of the petitioner.

Nonetheless, the respondents, in attempting to downplay the facts supporting petitioner's punitive damage

claim, have taken great liberties with the record. For example, in their Brief in Opposition, the respondents state that the

> Petitioner contended that Piedmont discharged him, but the courts below made no finding on the point. . . . Petitioner testified, however, that *he* called a Piedmont official to complain about pilot harassment, that Piedmont offered to find another job for him, and that he responded that he would be "happy" if Piedmont could get him a pilot's position on a "nonunion" airline and would ". . . hand in a letter of resignation . . . " if Piedmont succeeded.

Respondents' Brief in Opposition at 5 n.3.

The first sentence of this footnote—although factually correct—creates the false impression that the "discharge" issue was presented to the lower courts and that they ruled adversely to the petitioner. That simply is not the case. The "discharge" issue has yet to be presented to the trier of fact—the jury.

To further bolster its false impression and downplay the facts, footnote 3 goes on to take bits and pieces of petitioner's conversations and string them together to create the impression that petitioner resigned and would be "happy" if Piedmont found him a job with a nonunion carrier. Nothing could be further from the truth! The respondents fail to inform the Court that these bits and pieces of conversation—which they have so cleverly woven together—were taken from two different conversations, with two different Piedmont officials, on two separate dates. The respondents also fail to inform the Court that some of the bits and pieces of conversation took place after Piedmont officials had removed the peti-

tioner from further flight duties and told him to find other employment.

Although it is perfectly proper for an advocate to characterize the facts in a light most favorable to his client, it is quite another matter for an advocate to take bits and pieces of conversations out of context and then cut and paste them to create false impressions designed to mislead the Court.

It is respectfully submitted that, for purposes of reviewing the dismissal of petitioner's punitive damage claim, the Court should base its decision on the facts as alleged in the complaint. Those facts—recounting the blacklist and the slowdown to enforce the blacklist—allege conduct justifying an award of punitive damages.

CONCLUSION

For the foregoing reasons, the Court should disregard the respondents' opposition to this petition. The lower courts are in disarray as to what facts, if any, authorize an award of punitive damages in duty of fair representation cases. This petition offers the Court an opportunity to clarify an important question of federal labor policy and resolve any ambiguity created by the concurring decision in *Foust, supra*, 442 U.S., at 53.

Additionally, this petition raises the important issue of whether the Railway Labor Act preempts an employee's state tort claims against other employees where the federal law provides neither a forum to address his claims nor a method by which he can obtain relief.

Accordingly, the petitioner respectfully requests this Court grant his petition.

Respectfully submitted,

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